S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee	UNPUBLISHED October 13, 2005
v	No. 255453 Crawford Circuit Court
ANTHONY JOSEPH HART, Defendant-Appellant.	LC No. 03-002149 FH

Before: O'Connell, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim between thirteen and sixteen years of age). He was sentenced as an habitual fourth offender, MCL 769.12, to twelve to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that unresponsive testimony alleging that he had committed a similar act denied him a fair trial. During rebuttal, the prosecution asked the complainant's mother whether the complainant seemed to agree that she should press charges, and her mother replied, "I talked to her and explained to her that *he had done it in the past*" (emphasis added). Defendant did not object to this similar-act evidence. Therefore, this issue is not preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Following conviction, defendant moved for a new trial under MCR 6.431(b), claiming that this error would "support appellate reversal of the conviction." The trial court denied the motion, holding that although there was plain error, it did not affect defendant's substantial rights. We agree.

Whether to grant a new trial is within the sound discretion of the trial court, which we review for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). Also, we will not reverse a conviction based on an unpreserved issue except for plain error that affected a defendant's substantial rights by resulting in the conviction of an innocent person or seriously affecting the integrity, fairness, or public reputation of the judicial proceedings. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003); *People v Carines*, 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

Here, defendant concedes that the prosecutor did not rely on the evidence for any argument, and defendant does not argue that any prosecutorial misconduct occurred. Therefore, in light of *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), which held that unresponsive testimony in response to a proper question is not grounds for granting a mistrial,

we hold that the trial court did not abuse its discretion when it held that this conceded plain error did not affect substantial rights.

Defendant also argues that the trial court committed an error requiring reversal when it barred defendant from asking the complainant whether she told a witness about a "similar incident" with another person. After the prosecution objected, defendant made an offer of proof, and the trial court ruled that the questioning was barred by MCL 750.520j (the rape shield law). Therefore, this issue is preserved. MRE 103(a)(2); *People v Hackett***,** 421 Mich 338, 352; 365 NW2d 120 (1984).

The admissibility of evidence is within the sound discretion of the trial court, which we will not reverse unless the trial court abused it's discretion.[1] *Hackett, supra* at 349, 365. We hold that the trial court did not abuse its discretion when it held both that the question concerned sexual conduct of the complainant and that no exception to the rape shield law applied.

Defendant does not argue that a statutory exception would apply, but claims that because the evidence was purportedly offered for impeachment purposes, it did not concern sexual conduct. Essentially, defendant implies that the rape shield law is inapplicable to impeachment evidence. Defendant's argument is without merit. *Hackett, supra* at 348, provides that the rape shield act applies to impeachment evidence. Also, the test for determining whether a statement concerns sexual conduct within the meaning of the rape shield law is "whether the statement[] do[es] or do[es] not *amount* to or *reference* specific conduct." *People v Ivers*, 459 Mich 320, 329; 587 NW2d 10 (1998) (emphasis in original). Thus, the trial court did not abuse its discretion when it held that the proffered evidence concerned sexual conduct.

Alternatively, defendant argues that even if the similar incident concerned sexual conduct of the complainant, it should have been admitted for impeachment purposes under *People v Mikula*, 84 Mich App 108, 115-116; 269 NW2d 195 (1978). However, *Mikula* does not create any general impeachment exception to the rape shield law. Instead, it provides that a "defendant may cross-examine the complainant regarding prior *false* accusations of a similar nature." *Id.* (emphasis added). Here, defendant never claimed that the other allegation was false nor did he even seek an in camera hearing. Instead, defendant seems to argue that the *Mikula* exception should apply because the complainant "told inconsistent stories" to a witness. Even assuming, without deciding, that prior inconsistent statements would be admissible despite the rape shield law, defendant cannot establish that the two "stories" are inconsistent. Specifically, the complainant could have been the victim of more than one assault. Accordingly, the witness' claim that the complainant told her about an incident with another person is not inconsistent with the complainant's testimony that she told her about the alleged assault by defendant because the complainant could have told her about more than one incident. Finally, defendant concedes that

[1] Defendant argues that de novo review should apply to the threshold issue of whether the proffered evidence concerned sexual conduct, citing *People v Williams*, 191 Mich App 269, 272-273; 477 NW2d 977 (1991) Nothing in *Williams* supports defendant's argument. Furthermore, *Hackett, supra* at 365, which defendant cites, provides that "[a]lthough evidence of the statement was not evidence of prior sexual conduct within the terms of MCL 750.520j(1) . . . we are not convinced that the trial court abused its discretion in excluding the evidence."

because he did not argue below that his objection was based on any constitutional right, the issue is not a constitutional one. Thus, the trial court did not abuse its discretion in barring the questioning at issue. *Hackett, supra* at 348 (cautioning that the trial court "should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.") Finally, because the trial court ruled that the evidence would still be inadmissible even if defendant had given the prosecutor the notice required under MCL 750.520j(2), we need not decide whether defendant was required to give the prosecutor any notice.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy